No. 78-1522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

STATE OF UTAH

BRIEF OF JUSTHEIM PETROLEUM COMPANY, AS AMICUS CURIAE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK J. ALLEN
351 South State St.
Salt Lake City, Utah 84111

Richard C. Cahoon
Frank J. Allen
351 South State Street
Salt Lake City, Utah

INDEX

CITATIONS

Cases:

Statutes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

STATE OF UTAH

BRIEF OF JUSTHEIM PETROLEUM COMPANY, AS AMICUS CURIAE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This brief is submitted as supplemental to and supportive of the State of Utah's brief. The Amicus feels competent to add to the Court's understanding of the issues for reasons which the Tenth Circuit Court of Appeals found adequate and persuasive.

ARGUMENT

In the "questions presented" section of his Petition for Certiorari, the Secretary has (1) isolated the Taylor

Grazing Act (the "Act") as the sole source of his purported authority to control state selections and (2) confessed that, to sustain his position, this Court must interpret the Act as a withdrawal of all federal public domain in Utah, so far as eligibility for state selection is concerned, subject to the Secretary's discretion to restore or refuse to restore it as selection applications are received based on his judgment whether the lands sought to be selected are more valuable than the base lands.

The Secretary contends, therefore, that the Act, despite the facial innocence of its language, was a congressional device surreptitiously but dramatically to reduce the federal obligation under the relevant enabling acts from an objective and enforceable duty to a matter of Secretarial grace. In support of that contention, the Secretary has, throughout the course of this litigation, relied on inter-office memoranda and departmental correspondence generated decades after the Act's passage as if those documents could legitimately be considered a part of the Act's legislative history or provide valid insights to legislative intent at the times (1934 and 1936) when the Act was under congressional consideration.

In its Decision here sought to be reviewed, the Circuit Court of Appeals has shown how thoroughly out of harmony with the spirit of the enabling acts the Secretary's urged construction of the Act would be and how unsophisticated a reading of congressional output is required to find support for that construction.

One objective of this Amicus brief is to emphasize to this Court that the Secretary, in his responses to state selection applications over decades following the Act's passage, gave no indication that he interpreted the Act to require an "eligible for selection as equal in value" classification of the lands identified for selection as a prerequisite to approval. The Secretary's classification authority under the Act is to be exercised "pending" and to expedite statutorily authorized "disposition," and that authority has consistently been construed, even where sale, exchange, or other disposition to individuals is concerned, to be limited. The Secretary can classify only to advance range management — or at least surface management — objectives. *Bleamaster v. Morton* (1971 CA 9 Cal) 448 F2d 1289; *Daniels v. U.S.* (DC-Okla) 247 F.Supp. 193. The authority was conferred under the terms of legislation clearly and solely designed to refoliate and protect the public range. The Act was *not* intended to correct inequities and deficiencies in the legislative machinery for indemnifying the states; the 1958 amendments to 43 USC 851 and 852 *were* so intended.

The Secretary correctly asserts that it has been undeviating departmental practice to classify lands sought to be selected by states as a prerequisite to approval of any selection application. But it is also true that, until the applications here in issue were submitted, the Secretary classified purely on the basis of enabling act criteria and apparently regarded such classification as a ministerial and routinely to be performed duty of his office.

The public land states have completed indemnity selections by hundreds of applications filed both before and after the 1958 and 1960 amendments to 43 USC 851 and 852. In no case did the Secretary call for value data or base his classification on any criteria except (1) the "open public domain" status of the lands sought to be selected and (2) the status of the base lands as lost to the selecting state by federal appropriation before the event (statehood or survey) which would otherwise have vested state title.

There is no documented history of any inter-sovereign negotiation about comparative values. In every case, the acreage of the lands approved for selection has been exactly the acreage of the lost lands identified as base in the selection list.[1] It is hardly possible that the values of selected and base lands were always even roughly equal. The United States had withdrawn the most valuable public lands (for forests, power sites, etc.) or they had been the subject of homestead or other entry before the states ever had opportunity to exercise selection rights. Until the 1958 and 1960 amendments to 43 USC 851, and 852, the proposition that lieu selections could actually indemnify the states was patently false.

The congressional output on which the Secretary relies as reflecting a legislative endorsement of his present position (so as to justify application of the doctrine that legislative acquiescence in long-standing administrative practice is an index to original legislative intent) is, at best, suspect. The 1960 committee report to which he refers at page 19 of his Petition issued years before his "value for value" policy was formulated and could only have constituted endorsement of the enabling act authorized "acre for acre" classification practice being followed in 1960. Similarly, the comments of individual congressmen in the course of 1976 committee hearings (as quoted at page 23 of the Secretary's Petition) are not properly to be viewed as reflective of any pervasive legislative attitude. The views of those congressmen were never incorporated in any committee report or identified legislation.

[1]The record on appeal does not include evidence on this subject. Record deficiencies have not, however, deterred the Secretary. He has undertaken to inform this Court by footnoted statements and statistics (at variance with our information) whose source is not revealed.

The efforts to construct a foundation for use of "value for value" criteria in classifications for state selection purposes have been purely departmental efforts conducted in house and without notice to the states. It is not difficult for the Department of the Interior to influence the statements of House and Senate Interior Committee members. The close liason between the staffs of executive departments and legislative committees is generally wholesome, but it does permit the departments to create an illusion that Congress is thoroughly aware and approbative of administrative positions which have not had any real exposure to the public or even to the Congress. The use of value criteria can hardly be called an established and highly publicized administrative practice; the Secretary's *first* attempt to apply such standards precipitated this lawsuit.

Secondly, the Amicus would suggest to the Court that, despite the secretary's protestations that evil or devious motives cannot be ascribed to his office, the recognition of a departmental "discretion" in the selection process is tantamount to denial of selection rights. The record on appeal shows that the first of the selection lists under scrutiny was filed in 1965. The Secretary has presumably reacted to that stimulus in the continuing conviction that value for value criteria had somehow become controlling in lieu selection transactions. Nevertheless, the Secretary has not, in the ensuing fourteen years (or even since the first secret departmental expression of the idea in 1967), undertaken to generate any regulations for evaluation or any forms by which evaluation factors could be presented.[2] The persons holding the office have simply shown monolithic indifference to the State's desires and objectives.

[2]The appellate court decision sought to be reviewed makes note of the Secretary's failure to act in this regard.

The Secretary is prepared to "assume that he would be abusing his discretion if he failed to classify as available sufficient lands to satisfy outstanding state indemnity selections."[3] Nevertheless, the Secretary has not so classified *any* land. His practice is to defer any classification for selection availability (even though his authority under the Act is not so limited) until a selection application is received, and then to classify only the land sought to be selected.

The process by which the Secretary proposes to classify is one which entails interminable delays. If his policy is judicially approved, he will deny the pending applications because values are disparate. That decision will nevertheless be delayed for some significant time (in addition to the fourteen years which have already elapsed) because the Department has not yet done anything to prepare itself to adjudicate mineral selection applications.[4] The denial will presumably be subject to appeal but only, of course, on abuse of discretion grounds. The process must indefinitely be repeated for every mineral selection any state attempts to make until the state can convince an appellate tribunal at some level that the Secretary has arbitrarily refused to recognize value equivalence and the state's competence to protect the public interest. The states must approach selection in awareness of the Secretary's obsession that he must, as a function of his public trust, prevent the states from enjoying any possible advantage in the exercise of their selection rights.

The Secretary is quite capable, by sheer inaction, of defeating the states in their attempts to assert enabling act rights unless his function is the purely ministerial one which the lower courts have, in this case, perceived it to

[3]Secretary's Petition, page 21.
[4]Secretary's Petition's page 6.

be. Anyone who believes differently ignores history. It is not inappropriate to refer to the 1930 executive withdrawal of oil shale "temporarily" and for purposes of "classification." Half a century later, despite a scandalous national dependency on foreign fuel sources, the nation's oil shale is neither classified nor restored to leasing status,[5] and oil shale is making no present contribution to reduce the national energy deficit. The Amicus ascribes no evil motives to the Secretary, but history teaches us that his department is at least hopelessly inert. So far as Utah is concerned, the Secretary has effectively frustrated the objectives of its enabling act and blocked development of the major natural resource within its boundaries.

The Secretary suggests that the State of Utah is incapable of "managing public domain in a consistent and rational way" or giving appropriate weight to "overriding recreational, scenic and other environmental values."[6] Even if the State were the spiritually bankrupt entity the Secretary implies it to be the public interest is protected by federally administered environmental protection laws which are fully applicable without reference to land ownership. The assertion that state ownership of land "threatens" its "best management"[7] is not supported by the record or even any footnote data the Secretary has supplied. The accusation that the State is "profiteering" in asserting its rights in the statutorily prescribed manner is hardly an exhibition of diplomatic restraint.

[5]The oil shale leasing "program" to which the Secretary refers is limited to 20,000 acres, and resulted in the acquisition of oil shale positions by companies with substantial investment in foreign oil production and production facilities. The program was not even conceived until years after Utah commenced selection of the lands in question. Arguably, it was conceived *because of* state selection.

[6]Secretary's Petition, page 11.

[7]Secretary's Petition, page 12.

The tone of the Secretary's Petition reflects the departmental attitude which has been evident throughout this litigation. The Secretary sees the state as a supplicant without stronger claim for federal favor than any individual applicant for small tract purchase or other acquisition of rights in public land. He recognizes no federal obligation deriving from enabling acts, and unabashedly asserts that he (or at least the federal establishment) is the sole guardian of the public interest. The notion that federal agencies are infinitely wise and incorruptible has undergone significant erosion in the last decade. The Amicus submits that the lower courts have correctly assessed the role of the Secretary in the implementation of enabling act concepts. That assessment conforms with the popular feeling that management of public resources is best entrusted to states and local governments.

Respectfully submitted,

FRANK J. ALLEN

351 South State St.
Salt Lake City, Utah 84111